

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

DEBRA D. BURTIN

Claimant

VS.

STATE OF KANSAS

Respondent

AND

STATE SELF INSURANCE FUND

Docket No. 1,055,248

ORDER

STATEMENT OF THE CASE

Respondent and the State Self Insurance Fund (respondent) requested review of the October 13, 2011, preliminary hearing Order entered by Administrative Law Judge Brad E. Avery. Dallas L. Rakestraw, of Wichita, Kansas, appeared for claimant. Lara Q. Plaisance, of Kansas City, Kansas, appeared for respondent.

The Administrative Law Judge (ALJ) found that claimant suffered an accidental injury that arose out of and in the course of her employment on February 28, 2011. Respondent was ordered to pay medical bills related to her accidental injury of February 28, 2011. The ALJ further found that claimant's accident on January 20, 2011, did not result in any damage to her knee.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the October 7, 2011, Preliminary Hearing and the exhibits, and the Discovery Deposition of Debra D. Burtin taken June 10, 2011, and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

Respondent asserts the ALJ erred when he awarded benefits to claimant for a date of accident of February 28, 2011, arguing that the claimant had not given respondent timely notice of that accident, had not made a written claim for compensation, had not filed an Application for Hearing, had not served respondent with a notice of intent, and had not

filed an Application for Preliminary Hearing. Respondent further argues that any injury claimant may have sustained on either January 20, 2011, or February 28, 2011, did not arise out of and in the course of her employment with respondent.

Claimant first contends the exhibits attached to respondent's brief to the Board were not made exhibits at the preliminary hearing, were not in the record before the ALJ, and, therefore, should not be considered by the Board in this appeal. Claimant argues that respondent did not object to claimant's assertion that she suffered a series of traumas each and every working day and, therefore, it has waived any objection to her claim of a repetitive injury. Claimant asserts she complied with the requirements of K.S.A. 44-534 and K.S.A. 44-534a and, therefore, the ALJ had jurisdiction to enter his Order. She contends she gave respondent timely notice and provided a timely written claim on January 24, 2011. Further, claimant contends she was on her employer's premises when she slipped and fell on January 20, 2011, and her injury of February 28, 2011, occurred while she was working. Therefore, claimant argues her injuries were not excluded by the going and coming rule.

The issues for the Board's review are:

- (1) Are the exhibits attached to respondent's brief to the Board a part of the record?
- (2) Did the ALJ have jurisdiction to enter an order granting workers compensation benefits to claimant for a date of accident of February 28, 2011? Does claimant's injury of February 28, 2011, relate back to her injury of January 20, 2011, so as to be covered under her "Amended Application for Hearing" filed October 19, 2011?
- (3) Did claimant give respondent timely notice and written claim for a date of injury of February 28, 2011?
- (4) Should claimant be denied workers compensation benefits based on the going and coming rule?
- (5) Should claimant be denied benefits because she was performing an activity of daily living at either time she was injured?

FINDINGS OF FACT

Claimant works for the 13th Judicial District for the State of Kansas as a judicial administrative assistant for Judge Jan Satterfield. The 13th Judicial District is comprised of three counties, Elk County, Butler County and Greenwood County. Claimant's home office is in the courthouse in Eureka, Kansas, in Greenwood County. However, she travels to the courthouses in Elk County and Butler County when Judge Satterfield holds hearings in those counties. Claimant is reimbursed for her travel expenses from the courthouse in Eureka, Kansas, to the Elk County and Butler County courthouses and for her meals when

she is working in Elk County and/or Butler County. Although she is an employee of the State of Kansas, her reimbursement for mileage and meals comes from the counties. Claimant testified that although she and other court employees are paid by the State of Kansas, the respective counties provide the facilities for offices and courtrooms.

On January 20, 2011, claimant had worked at the Greenwood County Courthouse. At about 5 p.m., as she was leaving work, she stepped out of the door of the Greenwood County Courthouse when she slipped and fell. She landed on her right knee. Claimant testified there are three doors to the Greenwood County Courthouse, and she was permitted to enter and exit from any of the three doors. When she fell, claimant had exited the courthouse through the main door, which is one used by the general public in entering and exiting the building.

After claimant fell, she thought she was okay and went home. She had no problems with her right knee while driving home. However, the next day, she noticed her knee was sore when she went up and down stairs. On January 24, 2011, she reported her injury to Judge Satterfield and to the Court Administrator, Neil Harrison. A week after the accident, she noticed some swelling in her right knee. Her knee continued to hurt, and she took over-the-counter medications to relieve the pain. She first sought medical treatment on February 23, 2011, when she saw Dr. Mike McClintick, who ordered an MRI. The MRI was performed on February 24, and, according to claimant, "didn't show much."¹

On February 28, 2011, claimant had been working at the Butler County Courthouse in El Dorado, Kansas. She said she was in extreme pain that day. She was on her way home from El Dorado when she pulled into a Casey's to get fuel. She put the fuel in her vehicle, and when she got back in the vehicle, something in her knee popped. She said the pain was such that she had to wait a while to let it ease up before continuing home. When she got home, she could not walk and called her husband, who took her in to see Dr. McClintick. Dr. McClintick referred her to a specialist in Wichita, but as she could not get in to see the specialist for several days, she called Dr. Chris Miller, who was able to get her in to see him the next day. Dr. Miller took x-rays and then scheduled her for arthroscopic surgery for March 2, 2011. Claimant testified that during surgery, Dr. Miller found she had three meniscus tears and "shredded" cartilage.² Claimant testified she reported this injury to Judge Satterfield and Mr. Harrison for the purpose of informing them she would be off work for a period of time, not because she was seeking any benefits from respondent.³

¹ Burtin Depo. at 29.

² Burtin Depo. at 31.

³ P.H. Trans. at 18.

Claimant testified that the Casey's at which she put fuel in her vehicle was located three blocks north of the courthouse in Eureka. She said her home was located six miles north of Casey's. She acknowledged that the Casey's was located on her route home from the courthouse in Eureka. Claimant testified she stopped for fuel about 4:50 p.m. on February 28, 2011, and she was still on the clock. On cross-examination, however, she stated she was a classified employee and does not clock in or out at work. She is a salaried employee who is expected to work 40 hours a week, although she may work more than 8 hours on some days and less than 8 hours on other days. She admitted she was not performing any duties for her employer at the time she was getting fuel at the Casey's.

Claimant filed her original Application for Hearing on April 4, 2011, where she claimed an accident injury to her right knee when she slipped and fell while performing her "normal work duties" on or about January 25, 2011.⁴ On September 8, 2011, she filed an Application for Preliminary Hearing with regard to an accident that occurred "on or about 1/25/11." A preliminary hearing was held on October 7, 2011, at which time claimant's attorney announced he was alleging a series and would be amending claimant's E-1 after the hearing. Claimant's Amended Application for Hearing was filed on October 19, 2011, and listed a date of accident of January 25, 2011, and each and every working day thereafter.

PRINCIPLES OF LAW

K.S.A. 2010 Supp. 44-555c(a) states in part: "The review by the board shall be upon questions of law and fact as presented and shown by a transcript of the evidence and the proceedings as presented, had and introduced before the administrative law judge."

K.S.A. 2010 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends." K.S.A. 2010 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.⁵

⁴ At claimant's discovery deposition, she testified her fall occurred on January 20, 2011. At that time, claimant's attorney stated the E-1, Application for Hearing, had the wrong date and that he would amend it. When the Amended Application for Hearing was filed, however, it also listed a date of accident of January 25, 2011.

⁵ K.S.A. 2010 Supp. 44-501(a).

Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.⁶

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.⁷

In *Jackson*,⁸ the court held:

When a primary injury under the Workmen's Compensation Act is shown to have arisen out of the course of employment every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury.

K.S.A. 44-520 states:

Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the

⁶ *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

⁷ *Id.* at 278.

⁸ *Jackson v. Stevens Well Service*, 208 Kan. 637, Syl. ¶ 1, 493 P.2d 264 (1972); see also *Logsdon v. Boeing Company*, 35 Kan. App. 2d 79, 128 P.3d 430 (2006)

employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.

K.S.A. 44-520a(a) states:

No proceedings for compensation shall be maintainable under the workmen's compensation act unless a written claim for compensation shall be served upon the employer by delivering such written claim to him or his duly authorized agent, or by delivering such written claim to him by registered or certified mail within two hundred (200) days after the date of the accident, or in cases where compensation payments have been suspended within two hundred (200) days after the date of the last payment of compensation; or within one (1) year after the death of the injured employee if death results from the injury within five (5) years after the date of such accident.

The "going and coming" rule contained in K.S.A. 2010 Supp. 44-508(f) provides in pertinent part:

The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include injuries to the employee occurring while the employee is on the way to assume the duties of employment or after leaving such duties, the proximate cause of which injury is not the employer's negligence. An employee shall not be construed as being on the way to assume the duties of employment or having left such duties at a time when the worker is on the premises of the employer or on the only available route to or from work which is a route involving a special risk or hazard and which is a route not used by the public except in dealings with the employer.

K.S.A. 2010 Supp. 44-508(f) is a codification of the "going and coming" rule developed by courts in construing workers compensation acts. This is a legislative declaration that there is no causal relationship between an accidental injury and a worker's employment while the worker is on the way to assume the worker's duties or after leaving those duties, which are not proximately caused by the employer's negligence.⁹ In *Thompson*, the Court, while analyzing what risks were causally related to a worker's employment, wrote:

The rationale for the "going and coming" rule is that while on the way to or from work the employee is subjected only to the same risks or hazards as those to which

⁹ *Chapman v. Victory Sand & Stone Co.*, 197 Kan. 377, Syl. ¶ 1, 416 P.2d 754 (1966).

the general public is subjected. Thus, those risks are not causally related to the employment.¹⁰

But K.S.A. 2010 Supp. 44-508(f) contains exceptions to the "going and coming" rule. First, the "going and coming" rule does not apply if the worker is injured on the employer's premises.¹¹ Another exception is when the worker is injured while using the only route available to or from work involving a special risk or hazard and the route is not used by the public, except dealing with the employer.¹²

The Kansas appellate courts have also provided exceptions to the "going and coming" rule, for example, a worker's injuries are compensable when the worker is injured while operating a motor vehicle on a public roadway and the operation of the vehicle is an integral part or is necessary to the employment.¹³

In *Bryant*,¹⁴ the Kansas Supreme Court recently stated:

Even though no bright-line test for whether an injury arises out of employment is possible, the focus of inquiry should be on the [*sic*] whether the activity that results in injury is connected to, or is inherent in, the performance of the job. The statutory scheme does not reduce the analysis to an isolated movement[–] bending, twisting, lifting, walking, or other body motions but looks to the overall context of what the worker was doing[–]welding, reaching for tools, getting in or out of a vehicle, or engaging in other work-related activities.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.¹⁵ Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted

¹⁰ *Thompson v. Law Offices of Alan Joseph*, 256 Kan. 36, 46, 883 P.2d 768 (1994).

¹¹ *Id.* at Syl. ¶ 1. Where the court held that the term "premises" is narrowly construed to be an area controlled by the employer. See *Rinke v. Bank of America*, 282 Kan. 746, 148 P.3d 553 (2006).

¹² *Thompson*, 256 Kan. at 40.

¹³ *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995); *Halford v. Nowak Construction Co.*, 39 Kan. App. 2d 935, 938-39, 186 P.3d 206, rev. denied 287 Kan. 765 (2008); *Messenger v. Sage Drilling Co.*, 9 Kan. App. 2d 435, 680 P.2d 556, rev. denied 235 Kan. 1042 (1984).

¹⁴ *Bryant v. Midwest Staff Solutions, Inc.*, 292 Kan. 585, 596, 257 P.3d 255 (2011).

¹⁵ K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, rev. denied 286 Kan. 1179 (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, rev. denied 271 Kan. 1035 (2001).

by K.S.A. 2010 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.¹⁶

ANALYSIS

Claimant sustained an injury to her right knee on January 20, 2011.¹⁷ Respondent “admit[s] to accidental injury on that date as far as a traumatic event.”¹⁸ Notice and written claim were timely provided to the court administrator by claimant on January 24, 2011. Claimant has not proven, however, that she thereafter suffered a series of work related accidents, traumas or repetitive use injuries.

The incident on February 28, 2011, when claimant felt a pop in her knee as she was re-entering her vehicle after getting fuel, was most likely a natural consequence of her original traumatic injury of January, 20, 2011. There was no trauma to the knee on February 28, 2011. Whereas on January 20, claimant fell and sustained a direct trauma to her knee. She had pain and swelling thereafter. The January injury was severe enough that claimant reported it to her supervisor, completed an accident report and applied for workers compensation benefits. She sought medical treatment and was still receiving treatment when she suffered the aggravation about a month later. In fact, claimant had received medical treatment four days before the incident on February 28, 2011. Her symptoms had not resolved. Claimant said she was already in severe pain before her knee “popped” getting back into her truck at the gas station.¹⁹ Her symptoms worsened from that incident, but the record as it currently exists fails to prove that it constituted either a new accident or a new injury. The aggravation on February 28, 2011, was to the same area of the knee as the injury of January 20, 2011.

Claimant’s January 20, 2011, accident and injury did not arise out of and in the course of her employment with respondent. It is undisputed that claimant’s home office is in the courthouse in Eureka, Greenwood County, Kansas. That is where her slip and fall occurred. And so, even though claimant’s job required her to travel to other courthouses, she was not traveling to or from another courthouse when she suffered her fall. As such, the inherent travel and special purpose trip or errand exceptions to the going and coming rule do not apply to that accident.

¹⁶ K.S.A. 2010 Supp. 44-555c(k).

¹⁷ At the preliminary hearing, the ALJ erroneously referred to the date of accident as being January 24, 2011, as did the respondent in its brief to the Board. (See P.H. Trans. at 4; Resp. Brief (filed Nov. 7, 2011) at 3). Claimant’s E-1 Application for Hearing, E-1 Amended Application for Hearing, and E-3 Application for Preliminary Hearing erroneously refer to the date of accident as January 25, 2011. These errors were corrected by claimant in her discovery deposition taken June 10, 2011 (see pg. 4).

¹⁸ P.H. Trans. at 5.

¹⁹ Claimant’s Discovery Depo. (June 10, 2011) at 29.

The January 20, 2011, accident did not occur on respondent's premises. It occurred after claimant had left the judicial offices on the second floor of the courthouse where she worked. The courthouse is owned and maintained by the County, not by the State of Kansas, the Kansas Unified Judicial Department or the Thirteenth Judicial District for which claimant worked and which was claimant's employer.²⁰ Also, as the sidewalk was maintained by the County, the proximate cause of claimant's fall was not the negligence of the employer. Claimant slipped and fell on the sidewalk that was outside the main entrance to the courthouse. This was a sidewalk and entrance used by the general public having business there. As such, claimant's accident occurred while she was on her way home from work at a location where she was subjected to the same risks or hazards as those to which the general public was subjected. Pursuant to K.S.A. 44-508(f) accidents due to such risks are deemed not to arise out of the employment.

CONCLUSION

(1) The attachments to respondent's brief are not a part of the record for this appeal. They were neither offered during the preliminary hearing nor considered by the ALJ.

(2) (3) and (5) Claimant's date of accident is found to be January 20, 2011. Claimant has failed to prove she suffered a series of accidents or that she suffered an accident on February 28, 2011. As such, the remaining issues concerning timely notice, written claim, application for hearing and arising out of and in the course of employment for a series of accidents or an accident on February 28, 2011, are moot.

(4) Because she was on her way home from work and not on respondent's premises, claimant's accident on January 20, 2011, did not arise out of and did not occur in the course of her employment with respondent.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Brad E. Avery dated October 13, 2011, is reversed.

IT IS SO ORDERED.

²⁰ See *Murphy v. State of Kansas*, No. 1,054,829, 2011 WL 4942784 (Kan. WCAB Sept. 14, 2011).

Dated this _____ day of December, 2011.

HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

c: Dallas L. Rakestraw, Attorney for Claimant
Lara Q. Plaisance, Attorney for Respondent and the State Self Insurance Fund
Brad E. Avery, Administrative Law Judge